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Contracts by Railway Companies Granting to Taxicab Companies the Exclusive Privilege of Soliciting Business on Depot Grounds

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also be necessary that defendant's act was so dangerous in itself as to constitute criminal negligence. The real danger in employing the misdemeanor-manslaughter doctrine lies in the probability that convictions will be had where defendant's conduct is not dangerous in itself, or at least not dangerous in the degree required for criminal liability. Thus it is concluded that the misdemeanor-manslaughter doctrine is worthless and in some cases might work injustice, that it should be repudiated, and that convictions should be frankly based on criminal negligence.

WILLIAM RICE

CONTRACTS BY RAILWAY COMPANIES GRANTING TO TAXICAB COMPANIES THE EXCLUSIVE PRIVILEGE OF SOLICITING BUSINESS ON DEPOT GROUNDS

In the recent case of *Yellow Cab Co. of Ashland* v. *Murphy*[1] the Kentucky Court of Appeals overruled the holding of earlier cases in regard to the right of a railway company to grant to a taxicab company by contract the exclusive privilege of entering and using the railway company's grounds to solicit business. The Cab Company had entered into a contract with the Chesapeake and Ohio Railway whereby the former was granted the exclusive privilege of going on the depot grounds to solicit the transportation of passengers and baggage. The Company sought to enjoin the defendants from interfering in any way with the exclusive privilege granted by the contract. The defendants relied on the case of *McConnell* v. *Pedigo*[2] in which the court had declared a similar contract invalid. In the instant case the court rejected the reasoning of the *Pedigo* case and thus aligned Kentucky with the decided weight of authority on this question.

By the terms of the contract in the *Pedigo* case, McConnell was granted the privilege of standing his hacks at the railway company's

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mediately upon the firing of the shot? In the only case directly in point (Com. v. Owens and Evans, 198 Ky. 655, 249 S.W. 792 (1923) the indicement charged involuntary manslaughter of a woman known to defendants to be afflicted with heart trouble by going to her house and "raising a racket, fuss and altercation" with her. The court, after stating its usual definition of involuntary manslaughter, sustained the demurrer to the indictment on the ground that the allegations that defendants raised a racket and altercation were simply conclusions, "Without determining the question of whether one may be guilty of homicide in any of its degrees by the commission of some unlawful act which produces in the victim excitement, irritation, anger, terror or agitation. . . ."

[1] 243 S.W. 2d 42 (Ky. 1951).
[2] 92 Ky. 465, 18 S.W. 15 (1892).

loading platform in consideration of his agreement to carry the U. S. mail from the depot to the post-office. This privilege was conferred to the exclusion of all other hacks. In construing the contract the court apparently concluded that by its terms the railway company could have excluded from the loading platform any other hack, even though under a contract of hire to receive a passenger at the depot. ". . . if this power is recognized as being within what is termed a reasonable regulation in the conduct of its business, the company can deny to anyone carrying for hire the right of access to its depot for passengers and freight, and thereby monopolize the entire business of transporting passengers and freight to their proper destination. . . ."[3]

As further bases for its holding, the court said that the ". . . contract prevents competition, and makes such a discrimination as is unreasonable and detrimental to the public."[4] By virtue of the privilege the favored hackman would have a practical monopoly and the privilege would concern a matter outside the scope of the railroad's duty as a common carrier. Furthermore, under the court's interpretation of the contract, a passenger who had ordered a hack would be compelled to go some distance away from the platform to enter the hack, as only McConnell's hacks could stand at the platform to receive passengers.

The *Pedigo* case basically follows the reasoning used in a minority of the jurisdictions in the United States.[5] The bases of these decisions also appear to be that such contracts would restrict and prevent competition, tend to create a monopoly, be against the public policy, be outside the scope of the railroad's duty, and produce inconvenience and loss to the public.[6] Some of the courts upholding the minority view also seem to object to the railroad's making a profit by way of arbitrarily admitting for monied consideration one cab company and excluding all others. In an early case[7] the Pennsylvania court held that regulations for the conduct of a railroad's business should apply

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[3] *Id.* at 468, S.W. at 16.

[4] *Id.* at 470, S.W. at 16.

[5] Commonwealth v. Grau, 16 Pa. Dist. R. 806 (1907; Indianapolis Union R. Co. v. Dohn, 153 Ind. 10, 53 N.E. 937 (1899); Pennsylvania Co. v. Chicago, 181 Ill. 289, 54 N.E. 825 (1899); State v. Reed, 76 Miss. 211, 24 So. 308 (1898); Kalamazoo Hack & Bus Co. v. Sootsma, 84 Mich. 194, 47 N.W. 667 (1890); Cravens v. Rodgers, 101 Mo. 247, 14 S.W. 106 (1890).

[6] Indianapolis Union R. Co. v. Dohn, 153 Ind. 10, 53 N.E. 937 (1899); State v. Reed, 76 Miss. 211, 24 So. 308 (1898). See also Palmer Transfer Co. v. Anderson, 131 Ky. 217, 115 S.W. 182 (1909) which followed the reasoning in the *Pedigo* case.

[7] Commonwealth v. Grau, 16 Pa. Dist. R. 806 (1907). This case, however, has been overruled by the later case of Lehigh Valley R. Co. v. Graham, 64 Pa. Super. Ct. 437 (1916).

to everyone alike and that a railroad should not be allowed to grant by contract special favors to one cab company.

Some of these decisions have been based on statutory or constitutional provisions. The Missouri court held that a contract granting the privilege of exclusive use of a given loading platform was contrary to public policy and to the spirit of a constitutional clause prohibiting "... 'discrimination in charge or facilities in transportation ... between transportation companies and individuals, or in favor of either.' "[8] The court went on to say that a corollary to the cab company's duty as a common carrier was its right to equal facilities. In this way competition would be stimulated, while, if equal facilities were not granted, competition would be discouraged, a monopoly created, and the traveling public inconvenienced. Similarly the Michigan court relied in part upon a statutory provision in an 1890 case.[9] Here the statute required that all railroad corporations grant equal facilities for transportation of passengers and freight to all persons, companies, or corporations. In addition to holding that the statute was applicable and thus nullified the contract, the court further held that a contract granting exclusive privileges to a cab company would be against public policy in that it tended to establish a monopoly and infringed upon the rights of the public and others having or carrying on business in connection with railroad traffic and travel.

Even though some courts construe the statutory and constitutional provisions as nullifying contracts similar to the one in question, it is more generally held that such provisions do not apply.[10] The language of the provisions is generally similar in requiring that railroad companies give to all persons or companies reasonable and equal terms, facilities, and accommodations for the use of its depot and other buildings and grounds.[11] The courts have used various reasoning processes

[8] Cravens v. Rodgers, 101 Mo. 247, –, 14 S.W. 106, 108 (1890). Contra, Commercial Travelers v. Marshall Bros. Livery Co., P.U.R. 1918 E 391 (1918).

[9] 84 Mich. 194, 47 N.W. 667 (1890). In Dingman v. Duluth, S. S. and A. Ry. Co., 164 Mich. 328, 130 N.E. 24 (1911), the court did not expressly overrule the above decision, but said the "decision itself is probably not in harmony with the current weight of authority." A number of the majority cases were then cited and discussed by the court.

[10] A.L.R. 356 (1921).

[11] The Kentucky Constitutional provision on the subject is sec. 214; "No railway ... company shall make any exclusive or preferential contract or arrangement with any individual, association or corporation, for the receipt, transfer, delivery, transportation, handling, care or custody of any freight, or for the conduct of any business as a common carrier." As is shown in the discussion developed on interpretation of such provisions, this section governs the railway's business as a common carrier. The reasoning followed by the majority courts is even strengthened by the express statement here: "or for the conduct of any business as a common carrier." Thus it would control contracts in relation to carrying passengers

to find that the language does not include these contracts. In one case it was held that the statute in question obviously referred to the use of a right. The statute does not set out who can use the depot, but only requires that those who have a right to use it shall have a use equal to other holders of the same right. A license given by the railroad company to a stranger could not and should not be considered a license to all the world.[12] Other courts say the statutes apply only to preferences by common carriers in respect to their services as such,[13] or only to persons who have a contract relation to the common carrier.[14] A hackman who does not have a contract with the railroad would not be within either of these classes. The Oregon court in a 1917 case[15] applied generally the reasons given above and went on to say the purpose of the statute was to prohibit preferences among passengers and shippers. The court also held that a section of the constitution providing that "No law shall be passed granting to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens,"[16] relates only to the enactment of laws and does not prohibit or regulate the right to contract.

From the discussion above it can be seen that even where statutes are involved a majority of the courts uphold contracts such as the one in question. This leads into a consideration of the basic reasoning used by the majority of courts irrespective of statutory or constitutional regulation. As the Kentucky Court generally applied the reasoning of the majority view, the *Yellow Cab* case will be considered in conjunction with other cases which have decided the particular point. The writer will apply that reasoning to dispose of each point, where applicable, in the *Pedigo* case. There will also be a discussion of other points not raised in the *Pedigo* case which have served as bases for the majority view.

One reason for the majority holding is that the railroad company should have a right to limit the number of cab solicitors on the railway's premises. The exercise of this right is correlative to the duty

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as the railway's duty but would not control contracts incidental to its duty to provide for the passengers' comfort and convenience. The reasoning on this is more fully developed in the text of this article.

[12] Old Colony R. Co. v. Tripp, 147 Mass. 35, 17 N.E. 89 (1888).

[13] Norfolk & W. Ry. Co. v. Old Dominion Baggage Transfer Co., 99 Va. 111, 37 S.E. 784 (1901); Barker v. Midland Ry. Co., 18 C. B. 46, 139 Eng. Reprint 1281 (1856).

[14] New York, C. & H. R.R. Co. v. Ryan, 71 Misc. 241, 129 N.Y. Supp. 55 (1911); Godbout v. St. Paul Union Depot Co., 79 Minn. 188, 81 N.W. 835 (1900).

[15] Baggage and Omnibus Transfer Co. v. City of Portland, 84 Or. 343, 164 P. 570 (1917).

[16] Or. Const. Art. I, sec. 20.

to provide for the comfort, safety, and convenience of the passengers and to see that the passengers are not annoyed, disturbed, or obstructed.[17] The courts then apply this rule by saying that unlimited solicitation would be an intolerable situation. Incoming and outgoing passengers would be subject to confusion, turmoil, importunate solicitations, and even danger if open competition among cabmen were permitted on depot premises.[18] Hence the limiting of solicitation is within the railway's duty, as a common carrier must see that the premises are clean, clear, comfortable, and pleasant.[19] Furthermore, the solicitation would be an act affecting a passenger. "A passenger's status as such ordinarily continues from the time he has alighted from the carrier's vehicle at his destination until he has had a reasonable opportunity to leave the carrier's premises. . . ."[20] Even though it may be argued that the reasoning set out above does not apply where the contract is only for a cab stand on the premises (as in the *Pedigo* case), it is submitted that such an arrangement would greatly reduce confusion and turmoil. If no such stand were granted, instead of vying with each other for the passenger's business the cabmen would be arguing among themselves as to the use of the open cab-stand. Insofar as the railway-cab company relationship is concerned, the former has no duty to permit the other to enter. Whatever is done outside the obligation of the railway as a public carrier is done as a matter of favor, not of right.[21] A disappointed cabman, therefore, could not complain of an infringement of his rights but could only regret the loss of a privilege. It may well be argued that the Court in the *Pedigo* case laid out a fallacious rule, when they said that granting an exclusive cabstand privilege is not the lawful exercise of a right correlative to the discharge of its duties. Even if it be conceded that the rule was correctly stated, it would have no application in the *Yellow Cab* case. This involved a contract limiting solicitation privileges and coming clearly within the railroad's rights in the discharge of its duty to provide for the comfort, convenience, and safety of its passengers.

Another reason for the majority holding stems from the courts' interpretations of these contracts. As will be shown they do not consider that the contracts authorize the total exclusion of *all* competing

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[17] Donovan v. Pennsylvania Co., 199 U.S. 279 (1905), Union Depot & Ry. Co. v. Meeking, 42 Colo. 89, 94 P. 16 (1909).

[18] New York, C. & H. R. R. Co. v. Ryan, *supra*, note 14; Thompson's Express and Storage Company v. Norman Mount, — N.J. —, 111 A. 173 (1920); New York, N. H. & H. R. Co. v. Scovill, 71 Conn. 136,41 A. 236 (1898). Also see Godbout v. St. Paul Union Depot Co., 79 Minn. 188, 81 N.W. 835 (1900).

[19] Skaggs v. Kansas City Terminal Ry. Co. 233 Fed. 827 (1916).

[20] 13 C.J.S. 1073 (1939).

[21] Lehigh Valley R. Co. v. Graham, 64 Pa. Super. Ct. 437 (1916).

cab-drivers from any use of the stand. It is submitted that the Court improperly construed the contract in the *Pedigo* case. By the terms of the contract, as they were interpreted by the Court, the privileged hackman could have excluded from the platform all competitors receiving or discharging passengers even though under contract. The privilege of standing hacks at a loading platform, however, must be exercised in such a way as not to interfere with the right of ingress and egress to and from the station by passengers or prospective passengers of the railway. Where a strip of land has been designated as a given hackman's stand, the right of other hackmen to free access to the depot for taking or receiving passengers with whom they have a contract is not denied. The only injunction to which the favored hackman would be entitled is one prohibiting others from obstructing him in the use of the land as a hackstand and place of plying his vocation.[22] The Court in the *Yellow Cab* case said, "The contract there like the one here does not and cannot prevent others from entering the station grounds of a railroad company to deliver or receive passengers or baggage on an order or contract."[23] The question of hackmen's rights and privileges where the solicitation is done on the public sidewalk outside the depot was considered in *Donovan* v. *Pennsylvania Co.*[24] The United States Supreme Court in its much quoted opinion in this case said that cabmen can use the public sidewalk while soliciting business, provided that such use is made within reasonable limits and that such use does not interfere with the ingress and egress of passengers and employees. The owner of land has appurtenant rights of access to the public way and passengers, as members of the public, have a right not to be interfered with in their use of the public way. Hence the Court interpreted the contract in the *Pedigo* case too broadly when it found other hackmen could not approach the platform for delivering or receiving passengers under contract. The majority of the courts do not consider these contracts to be so comprehensive, and therefore do not invalidate the contracts on this ground.

The Court in the *Pedigo* case also objected to the unreasonable discrimination given by the contract which merely granted a hack-stand to McConnell. The majority of courts, however, in later cases involving the exclusive privilege of soliciting business on the railroad's premises have held it not to be an unfair or unreasonable discrimination. The writer believes that if the earlier court found the exclusive hackstand privilege an unreasonable discrimination, it would have

[22] Union Depot & Ry. Co. v. Meeking, 42 Colo. 89, 94 P. 16 (1909).
[23] 243 S.W. 2d 42, 45 (1951).
[24] *Supra*, note 17.

found the exclusive privilege of solicitation even more unreasonable. The former involves convenience to passengers in seeking a cab to hire, whereas the latter entails active bargaining by the cabman and the passenger before the passenger knows that other cabs are available. In spite of the greater advantage offered by the latter privilege, courts have upheld it as not unreasonable. In the *Donovan* case[25] the Supreme Court admitted that any such arrangement would necessarily enable the favored cab company to control, to a great extent, the business of carrying passengers from the station. It did not, however, create a monopoly in the odious sense of that word.[26] "That arrangement is to be deemed, not unreasonably, a means devised for the convenience of passengers and of the railroad company, and as involving such use by the company of its property as is consistent with the proper performance of its public duties and its ownership of the property in question."[27] If the arrangement is reasonable and proper for the public and does not tend to deprive them of the proper opportunity to control their actions after leaving the depot, there is no ground for complaint. Furthermore there is no substantial denial of the public's rights as cabs are still free to enter the premises under the passenger's order, and as the drivers are entitled to solicit on premises adjacent to the railway's premises. Thus passengers are still free to engage whom they please, and cannot claim their rights have been

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[25] *Supra*, note 17.

[26] "The modern meaning of monopoly is a combination, organization, or entity so extensive, exclusive, and unified that its tendency is to prevent competition in its comprehensive sense with the consequent power to control prices to the public harm." BALLENTINE'S LAW DICTIONARY, 830 (1930). "According to the common law rule, not every restraint of trade is illegal. In order to be illegal, the restraint must be unreasonable. It is also essential to render an agreement in restraint of trade illegal that the public either has been or inevitably will be injured. . . . The combination is not illegal if the restraint of trade is no more than is necessary for its protection and not such as to injure the public." Within the language of the Sherman and Clayton Acts the following definition has been applied: "A combination of capital which by reason of its size and preponderant position in the business, has the power and purpose, or uses its power to exclude others from the business by illegal acts and unlawful and unfair methods of competition is an attempt at monopoly and illegal at the common law." CLARK, W. L. JR., HANDBOOK OF THE LAW OF CONTRACTS 434 (4th ed. 1931). It is submitted that the contracts in question do not create such monopolies as come within the above definitions. It is not a "combination so extensive that its tendency is to prevent competition in its comprehensive sense so that it can control prices to the public harm." The contract governs the cab business only at one particular spot and does *not prevent* all competition at that spot. Admittedly it gives a big advantage to the favored cab company but it does not grant exclusive control of the business. By the same token it is not an unreasonable restraint in view of its purpose and of its extent. And it is not felt that by these contracts the public has been or inevitably will be injured. One cannot escape the fact that these contracts only grant a favor and do not entirely prevent competition, either at the given depot or elsewhere.

[27] The question of the convenience to the passengers has been discussed *supra* and the question of the railroad's use of its property is discussed *infra*.

interfered with. In the *Yellow Cab* case the Court applied the above reasoning and held that there was not in fact a monopoly created, especially since the cabs could not be denied the right of entry to discharge or receive passengers under contract.

There was a fourth point raised in the *Pedigo* case, i.e., the inconvenience to the passenger from allowing only one company to furnish cabs convenient to the loading platform. Such an inconvenience would exist if the passenger were required to walk some distance in order to board a cab other than one having stand rights. This inconvenience resulted, however, only from the court's misinterpretation of the contract. As shown above the contract was considered as prohibiting all other cabs from using the platform. But, as also shown above, the terms of the contract properly construed did not require such a broad prohibition, and other cabs could use the platform on order by the passenger. Hence the only inconvenience would be a wait that was longer by a few seconds. The passenger would have this slightly longer wait for cabs which did not have the privilege of using part of the depot grounds as a cab stand. If it could be shown that there was a great inconvenience to the passenger, or even an inadequacy or unfairness of service by the favored cabman, the objection thereto could not be raised by the disappointed cabman. Any failure of the duty to provide for the passenger's comfort and convenience would have to be called to the attention of the court by the person injured or by the proper authorities.[28] In the cases discussed the party com-

[28] *Supra*, note 17. In the Donovan opinion the Supreme Court cites Chicago, St. L., & N.O.R. Co. v. Pullman Southern Car Co., 139 U.S. 79, 87, (1890) and the Express cases, 117 U.S. 1, 24 (1885). The railway company had a contract providing for the exclusive furnishing of sleeping car facilities in the one case and for the exclusive handling of express baggage in the other. The court held that so long as the public were reasonably served by these companies, there could be no complaint. The railroads, it said, were merely hiring other agencies to assist them in the fulfillment of their duties. Considering the need for uniformity of service and consistency of mehods there was not such an unreasonable restraint of trade as to constitute a monopoly. Furthermore, these contracts, once made, merely prevented the competitors from performing on the given line, but did not prohibit their competing for the privilege or their performing similar services on other lines. It is submitted, however, that the cases mentioned above are not directly in point with the instant case. The duty in the cases cited was to actively furnish certain facilities for the benefit of the passengers. It is clearly essential that there be only one company furnishing such facilities in order to achieve some degree of uniformity. And this uniformity, as well as the absence of open competition where the passenger is in the hands of the railroad, works to the benefit of the passenger. But in the instant case the duty was to prevent confusion and inconvenience, or, to put it in the active phase, to provide for the comfort and convenience of passengers around the depot. The contract in question was *one* way to prevent such confusion and inconvenience or to provide for such comfort and convenience. Hence in the former instance we have compliance with the contractual duties serving as an end in itself, while in the latter case, compliance with the terms of the contract will serve as a means to an end.

plaining of the contract was a cabman—not a passenger who has been injured by a failure of the railroad to fulfill its duty. As a third party, not conncted with the contract, and as a cabman, he could not complain of the violation of a duty to the public.[29] The writer believes, therefore, that the dictum in the *Pedigo* case concerning inconvenience should have, and did have, no weight in the *Yellow Cab* case. The dictum was based on an erroneous assumption, and even had the assumption not been erroneous, the proper party did not complain of the breach of the obligation.

In addition to the above-given reasons for overruling the early Kentucky view, there are at least two other factors which are considered by the majority courts. The first is the right of the railway company to use its own property as it sees fit and the second is the right of an individual to freely enter contracts. In relation to the first factor, cases have held that railroad property must be devoted principally to the public use to the extent necessary for public objects intended to be accomplished.[30] Aside from these objects, however, a railway has ordinary private property rights to exclude all who seek entry without superior legal title. There is a right of entry in those who seek to avail themselves of the railroad's services as a carrier.[31] Cabmen, however, cannot claim by virtue of the right to deliver or receive passengers contracting with them the further right to enter the grounds solely for their own business.[32] Nor can the cabmen come on the land by virtue of any duty. They do not owe a duty to incoming passengers to meet them at the station and solicit their patronage. If they do enter the premises, they do so in a private interest, not under a duty to the public or the railroad.[33] Concerning this factor the Supreme Court's opinion in the *Donovan* case is very clear. The Court had said that the railroad's use of its property must be devoted primarily to public use and to the extent necessary for the public ob-

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[29] *Supra*, note 21. See also Atlanta Terminal Co. v. American Baggage and Transfer Co., 125 Ga. 677, 54 S.E. 711 (1906).

[30] *Supra*, note 21.

[31] New York, N.H. & H.R. Co. v. Scovill, *supra*, note 18.

[32] In the case of Barker v. Midland Ry. Co., 18 C.B. 46, 139 Eng. Reprint 1281 (1856) Willes, J., said, "It certainly would be somewhat extraordinary if any such right (to enter depot grounds) could exist in one to whom the company owes no direct duty, but who merely brings to the station the individuals with whom the company contracts." Jervis, C.J., held that, as the bus company was not seeking to use the railway, the bus could not come upon the land. A *fortiori* the company could not enter the depot grounds for its own profit. It is believed that the statements made above are too broad, but, taken together, they are illustrative of the distinction to be made between a right of entry for the purpose of delivering passengers under contract and a right of entry for the purpose of gaining a private profit.

[33] Hedding v. Gallagher, 72 N.H. 377, 57 A. 225 (1903).

jects intended to be accomplished. The Court then continued as follows:

> "It by no means follows, however, that the company may not establish such reasonable rules, in respect of the use of its property, as the public convenience and its interests may suggest, provided only that such rules are consistent with the ends for which the corporation was created and not inconsistent with public regulations legally established for the conduct of its business. Although its functions are public in their nature, the company holds the legal title to the property which it has undertaken to employ in the discharge of those functions. . . . It is required, under all circumstances, to do what may be reasonably necessary and suitable for the accomodation of passengers and shippers. . . . It is not bound to so use its property that others, having no business with it, may make profit to themselves. Its property is to be deemed, in every legal sense, private property as between it and those of the general public who have no occasion to use it for purposes of transportation."[34]

In brief, then the majority of courts say that railways are entitled to the exclusive private ownership and possession of their property, except as modified by the rights of the public in relation to the railway as a carrier. Anyone seeking to use the property for his own benefit cannot avail himself of that modification to authorize his using the property. A cabman clearly seeks to use the property for his own benefit and hence, does not have an absolute right to use the railroad's premises.[35]

Besides the railway's right to the unhindered use of its property, a second factor is given consideration by the majority courts. This factor, the freedom to contract was given great weight in the upholding of the Yellow Cab contract. Quoting the opinion of Sir George Jessel, M.R., in an early English case,[36] the court said, ". . . com-

[34] Donovan v. Pennsylvania Co., 199 U.S. 279, 293 (1905).

[35] Union Depot & Ry. Co. v. Meeking 42 Colo. 89, 94 P. 16 (1909); Atlanta Terminal Co. v. American Baggage and Transfer Co. 125 Ga. 677, 54 S.E. 711 (1906); Skaggs v. Kansas City Terminal, *supra*, note 19. For a further discussion on this point see Black and White Taxicab and Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928). It will be noted that the Black & White Taxicab case involved a contract which was of the type in question and which was made in Kentucky. The Supreme Court decided the case contra to the Kentucky rule at that time. It was decided under the theory of Swift v. Tyson, 16 Pet. 1, 18 (1942) viz., in diversity of citizenship cases the federal courts do not, in matters of general jurisprudence, have to apply the unwritten law as interpreted by the highest court of the state where the case arose. Instead they can apply their own notions of the common law. Thus there could be the opposite holdings in the *Black and White Taxicab* and the *Pedigo* cases. The theory of Justice Holmes in his dissent in the *Black & White* case was followed by the Supreme Court in the case of Erie Railroad Company v. Tompkins, 304 U.S. 64 (1938) overruling the Swift v. Tyson doctrine. Under the holding in the case federal courts must apply the unwritten law as interpreted by the highest court in the state, except in matters governed by the Federal Constitution or acts of Congress. Now the federal decision would have to be in accord with the Kentucky decision.

[36] Printing and Numerical Registering Co. v. Sampson, L. R. 19 Eq. 462, 21 Eng. Rul. Cas. 696 (1875).

petent persons 'shall have the utmost liberty of contracting, and that their contracts, when entered into fairly and voluntarily shall be held sacred, and shall be enforced by Courts of justice.'"[37] Jessel in the above-cited opinion also stated that courts should not extend the doctrine of contracts being void as against public policy, because one of the prime tenets of public policy is that freedom of contract be not interfered with. The United States Supreme Court also requires limited application of the "void as against public policy" doctrine.[38] A clear detriment to the public interest will not be presumed where nothing sinister or improper is done or contemplated. Applying this theory to the cases at hand it is believed that the contracts should be upheld unless it could be clearly shown that the public has suffered by reason of the contract. The writer does not believe any such showing could have been made in either the *Pedigo* or *Yellow Cab* cases.

In view of the reasons given by the majority and of the reasons given for the *Pedigo* holding, it is submitted that the Kentucky Court of Appeals has brought this state into accord with the logical view on contracts by railway companies granting to cab companies exclusive solicitation privileges. The evils complained of in the *Pedigo* case were theoretical and based on a misinterpretation of the terms of the contract, or were so unusual or intermittent as to be outweighed by the other interests involved. It is therefore concluded that the Kentucky law is improved and modernized by the decision in the instant case.

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[37] 243 S.W. 2d 42, 45 (1951).

[38] Steele v. Drummond, 275 U.S. 199 (1927). Thus in the instant case there are involved conflicting aspects of public policy in relation to contracts. On the one hand is the doctrine favoring freedom of contract and on the other the one forbidding the creation by contract of combinations in restraint of trade. As shown in note 26, *supra*, it is the writer's opinion that the contract in question is not one that unreasonably restrains trade and hence should be upheld under the freedom of contract theory. It must be noted, however, under the concepts in relation to public policy on contracts may change over a period of time. Currently freedom of contract is not nearly so broad as it was at the time of Lochner v. State of New York, 198 U.S. 45 (1904) and Adkins v. Children's Hospital of District of Columbia, 261 U.S. 524 (1923). It has been limited by the expanding concept of the public welfare. There is a tendency to invalidate contracts, the terms of which might menace the health, safety, morals, and public welfare. Just what concerns this public interest is a matter for the determination of the legislature, which is given broad limits in the exercise of its powers. Thus the freedom to contract is not an absolute right, but is one limited by regulations and prohibitions as imposed by the legislature. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). See also the opinion of Mr. Justice Douglas in Day-Brite Lighting Inc. v. State of Missouri, 72 S. Ct. 405 (1952) for other cases on this point.